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No. 99-1246

In the Supreme Court of the United States

DOLE FOOD COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that the Department of Commerce (Commerce) reasonably applied the antidumping statute, 19 U.S.C. 1673 *et seq.*, in rejecting petitioners' asserted methodology for allocating the cost of raw pineapple fruit between the production of canned pineapple fruit and the production of pineapple juice.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	10
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Daewood Elecs. Co. v. *International Union of Elec. Workers*, 6 F.3d 1511 (Fed. Cir. 1993), cert. denied, 512 U.S. 1204 (1994)	8
Fujitsu Gen. Ltd. v. *United States*, 88 F.3d 1034 (Fed. Cir. 1996)	8
IPSCO, Inc. v. *United States*, 714 F. Supp. 1211 (Ct. Int'l Trade 1989)	9
IPSCO, Inc. v. *United States*, 965 F.2d 1056 (Fed. Cir. 1992)	6, 9
Wisniewski v. *United States*, 353 U.S. 901 (1957)	10

Statutes and regulation:

Tariff Act of 1930, 19 U.S.C. 1001 *et seq.*:	
19 U.S.C. 1516a(b)(1)(B)(i)	8
19 U.S.C. 1673	2
19 U.S.C. 1673(1)	2
19 U.S.C. 1673(2)	2
19 U.S.C. 1677b(a)(1)	2
19 U.S.C. 1677b(a)(4)	2
19 U.S.C. 1677b(b)(1)	2
19 U.S.C. 1677b(e)	3
19 C.F.R. 353.51(c) (1994)	3

Miscellaneous: Page

Canned Pineapple Fruit from Thailand:
59 Fed. 34,408 (Dep't Commerce 1994) 3
60 Fed. 36,775 (Dep't Commerce 1995) 5
H.R. Rep. No. 571, 93d Cong., 1st Sess. 71 (1973) 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 187 F.3d 1362. The opinions of the Court of International Trade are reported at 946 F. Supp. 11 (Pet. App. 17a-56a) and 19 I.T.R.D. 1339 (App., *infra*, 1a-3a).

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1999. The petition for rehearing was denied on October 28, 1999 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on January 26, 2000. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal antidumping statute, 19 U.S.C. 1673 *et seq.*, invests the Department of Commerce with authority to impose "antidumping duties" on foreign merchandise sold in the United States where two conditions are met. First, Commerce must determine that the merchandise "is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673(1). Second, the United States International Trade Commission must determine either that such sales are materially threatening or injuring an existing industry in the United States, or that they are materially retarding the establishment of an industry in the United States. 19 U.S.C. 1673(2). Where imposition of an antidumping duty is warranted, the amount of the duty is to equal "the amount by which the normal value exceeds the export price * * * for the merchandise." 19 U.S.C. 1673. That amount is known as the "dumping margin."

Commerce determines a product's normal foreign market value (FMV) with reference to either: (1) the price of such or similar merchandise sold in the exporting country or a third country; or (2) the constructed value (CV) of the imported merchandise. 19 U.S.C. 1677b(a)(1) and (4). If Commerce determines FMV by reference to product price, the statute directs Commerce to exclude from its determination all sales made below the cost of production (COP) if those sales were made over an extended period of time, in substantial quantities, and at prices that preclude recovery of all costs within a reasonable period of time in the normal course of trade. See 19 U.S.C. 1677b(b)(1). Commerce has promulgated regulations implementing this approach by providing that COP is "based on the

cost of materials, fabrication, and general expenses, but excluding profit, incurred in producing such or similar merchandise." 19 C.F.R. 353.51(c) (1994). If Commerce determines FMV by reference to CV, the statute directs Commerce to base its determination on the sum of (1) the cost of materials and fabrication, (2) an amount for general expenses and profit, and (3) the cost of all containers and coverings. 19 U.S.C. 1677b(e).

2. In 1994, in response to a petition filed on behalf of the domestic canned pineapple fruit industry, Commerce initiated an investigation of canned pineapple fruit (CPF) imports from Thailand to determine whether such imports were being sold at prices below their fair value. See Canned Pineapple Fruit From Thailand, 59 Fed. Reg. 34,408 (Dep't Commerce 1994). Commerce's investigation covered petitioners and three other entities: The Thai Pineapple Public Co., Ltd. (TIPCO); Siam Agro Industry Pineapple and Others Co., Ltd. (SAICO); and Malee Sampran Factory Public Co., Ltd. (Malee).

As part of its investigation, Commerce issued questionnaires to petitioners and later conducted an on-site inspection in Thailand to verify petitioners' responses to the questionnaires. That inquiry revealed that: (1) petitioners purchased fresh pineapple fruit (C.A. App. 63); (2) petitioners utilized that fresh pineapple fruit to produce both CPF and pineapple juice (*id.* at 64); (3) petitioners purchased some quantities of other fruit specifically for making juice products and paid a discounted price for that fruit (*id.* at 586); (4) petitioners' financial accounting system was in accordance both with generally accepted accounting principles (GAAP) in the United States and with Thailand's statutory accounting rules (*id.* at 66); (5) petitioners' financial accounting records allocated the

entire cost of the fresh pineapple fruit to the production of CPF, and allocated none of that cost to the production of pineapple juice (*id.* at 118); and (6) petitioners responded to Commerce's questionnaires by providing cost allocations based not on their financial accounting records, but on the relative weight of CPF and pineapple juice (allocations that petitioners had developed exclusively for the purposes of responding to Commerce's investigation) (*id.* at 580, 588).

Commerce's investigation culminated in a Final Determination published in the *Federal Register*. See Pet. App. 57a-100a. In its Final Determination, Commerce explained that when determining COP, its practice is "to adhere to an individual firm's [ ] recording of costs in accordance with GAAP of its home country if [Commerce] is satisfied that such principles reasonably reflect the costs of producing the subject merchandise." *Id.* at 82a.* Commerce further stated that "[n]ormal accounting practices provide an objective standard by which to measure costs, while allowing the [companies under investigation] a predictable basis on which to compute those costs." *Ibid.*

Turning to the instant case, Commerce explained that it had examined whether petitioners and the other companies under investigation employed reasonable

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* Commerce noted that its practice in this area is consistent with the legislative history of the statute's COP provision. Pet. App. 82a. In the legislative history accompanying the Trade Reform Act of 1973, the House Ways and Means Committee stated that "in determining whether merchandise has been sold at less than cost, [Commerce] will employ accounting principles generally accepted in the home market of the country of exportation if [Commerce] is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise." H.R. Rep. No. 571, 93d Cong., 1st Sess. 71 (1973).

fruit cost allocation methods. After noting that "each company had used its recorded fruit cost allocation methodology for at least a number of years," Pet. App. 83a, Commerce found "no evidence" that petitioners or any of the other companies under investigation "had not relied historically upon its recorded allocation percentages to compute its production costs." *Ibid.* Because the normal allocation methodologies for TIPCO, SAICO, and Malee were "consistent with Thai GAAP and appear to reasonably allocate fruit costs to CPF," Commerce adjusted those companies' submitted fruit costs "to reflect the allocations as calculated and verified under each company's normal accounting system." *Id.* at 85a. However, because it found that petitioners' "normal allocation methodology results in an unreasonable allocation of fruit costs to CPF," *ibid.*, Commerce "allocated [petitioners'] pineapple fruit costs based upon an average of the proprietary fruit cost allocation percentages used by Malee, SAICO, and TIPCO in their normal accounting systems." *Id.* at 86a-87a.

Commerce's Final Determination resulted in a dumping margin for petitioners of 2.36 %. After amending its determination to correct certain ministerial errors, Commerce assessed a revised dumping margin for petitioners of 1.73 %. See Canned Pineapple Fruit From Thailand, 60 Fed. Reg. 36,775 (Dep't Commerce 1995).

3. Petitioners and several other parties challenged the Final Determination in the Court of International Trade. After consolidating those actions, the court held, *inter alia*, that Commerce erred in rejecting petitioners' reported allocation methodology in favor of an average of the allocation percentages historically used by the other three companies. Pet. App. 32a. The court

concluded that the cost allocation methodology used in Commerce's Final Determination was inconsistent with the standards outlined by the Court of Appeals for the Federal Circuit in *IPSCO, Inc.* v. *United States*, 965 F.2d 1056 (1992) (*IPSCO III*). In the court's view, *IPSCO III* held that "value-based allocation violated the antidumping statute, and also found that * * * [a] weight-based methodology was the correct interpretation of the law." Pet. App. 38a-39a. Thus, the court remanded the matter to Commerce, stating that "Commerce may choose to accept the weight-based allocation methodologies put forth by * * * [petitioners] if they are otherwise acceptable, because these are cost, not price-based, methodologies, or it may rely on another non-output price-based cost allocation methodology." *Id.* at 42a. Commerce complied with the remand order, and the Court of International Trade then sustained Commerce's action. App., *infra*, 2a-3a.

4. The Court of Appeals for the Federal Circuit reversed the Court of International Trade's original remand order. Pet. App. 1a-14a. The court explained that "[t]he statute does not expressly authorize any specific allocation methodologies between items produced jointly," and that "[a]s a general rule, an agency may either accept financial records kept according to generally accepted accounting principles in the country of exportation, or reject the records if accepting them would distort the company's true costs." *Id.* at 7a (citing, *inter alia*, *IPSCO III*, 965 F.2d at 1060). In this case, the court noted that petitioners "agree[] that [their] normal allocation methodology, allocating 100% of the pineapple fruit cost to canned pineapple fruit, was distorted because it resulted in an overstatement of the cost of production for canned pineapple fruit." *Id.* at 10a. In contrast, the court stated that "[t]he meth-

odologies relied upon by Commerce in making its determinations are presumptively correct." *Id.* at 11a. Because it was "not presented with any information that would rebut [that] presumptive correctness" in this case, the court stated that it was "satisfied that Commerce's decision to use an average of the fruit cost allocation percentages used by TIPCO et al. to determine [petitioners'] cost of materials for canned pineapple fruit is reasonable and supported by substantial evidence." *Ibid.*

In reaching its decision, the court of appeals made clear that its prior decision in *IPSCO III* does not apply to this case. Pet. App. 11a. The court stressed that "pineapple fruit is not a homogeneous raw material like the raw material * * * [at issue] in *IPSCO III*, and the production process [at issue here] is entirely different for the various pineapple products produced." *Id.* at 13a. Unlike the cost allocation methodology employed by the Court of International Trade in *IPSCO III*, "[t]he methodology used by Commerce [in this case] was neither price-based nor circular" because "Commerce's allocation of the cost of the raw pineapple fruit between canned pineapple fruit and other products was not based on the selling price or output value of these products." *Ibid.* Accordingly, the court held that "under the facts of this case, * * * the Court of International Trade improperly held that *IPSCO III* was controlling precedent." *Ibid.*

ARGUMENT

Petitioners contend that the court of appeals misconstrued its decision in *IPSCO III* in holding that Commerce's Final Determination was based on a reasonable interpretation of the antidumping statute and was supported by substantial evidence. Petitioners

are incorrect. The decision of the court of appeals is correct and does not conflict with any decision of this Court, the Federal Circuit, or any other court of appeals. Further review is therefore not warranted.

1. The antidumping statute directs the courts to uphold Commerce's interpretation and application of the statute unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. 1516a(b)(1)(B)(i). Because Commerce is the "master of antidumping law," *Daewoo Elecs. Co.* v. *International Union of Elec. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), cert. denied, 512 U.S. 1204 (1994), reviewing courts defer to Commerce in its selection and development of proper methodologies for determining dumping margins. See *Fujitsu Gen. Ltd.* v. *United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996) (court "accords deference to the determinations of the agency that turn on complex economic and accounting inquiries"). In this case, the court of appeals noted petitioners' concession that their "normal allocation methodology, allocating 100% of the pineapple fruit cost to canned pineapple fruit, was distorted because it resulted in an overstatement of the cost of production for canned pineapple fruit." Pet. App. 10a. In light of that concession, petitioners cite no authority supporting their assertion that the court of appeals erred in deferring to Commerce's reliance on the average cost allocation percentages used by CPF producers under similar circumstances. Accordingly, the court of appeals properly deferred to Commerce's Final Determination in this case.

2. The decision of the court of appeals does not conflict with its earlier decision in *IPSCO III*. In that case, the Court of International Trade ordered Commerce to use domestic prices when allocating costs

between prime and limited-service oil country tubular goods (OCTG). See *IPSCO, Inc.* v. *United States*, 714 F. Supp. 1211 (1989). The Federal Circuit found that order to be premised on "an unreasonable circular methodology": "The selling price of pipe became a basis for measuring the fairness of the selling price of pipe." *IPSCO III*, 965 F.2d at 1061. The court held that such "circular reasoning contravened the express requirements of the statute which set forth the cost of production as an independent standard for fair value." *Ibid.*

This case materially differs from *IPSCO III* in at least two ways. First, there are important physical differences between the materials at issue in the two cases. The OCTG at issue in *IPSCO III* was produced from a "homogeneous raw material." Pet. App. 13a. In contrast, the raw material used to produce CPF consist of cored cylinders, cores, shells, and ends. Thus, "[a]lthough the raw material was purchased as a whole, for a set price per unit of weight, the parts of the pineapple differ in their usefulness and value." *Ibid.* These physical differences are significant because the homogeneous nature of the raw material used to produce OCTG supported Commerce's determination in that case to base its raw material cost allocations on weight. In this case, the varied nature of the raw material at issue makes reliance on weight as a cost allocator inappropriate. Second, the methodology employed by Commerce in this case "reflected the raw material allocations of TIPCO et al. as shown by their books and records." *Ibid.* Because "each company had used its recorded fruit cost allocation methodology for at least a number of years," *id.* at 83a, Commerce's use of that methodology in petitioners' case was neither

unreliable nor circular in the way the methodology at issue in *IPSCO III* was.

Moreover, even if the court of appeals' decision in this case were inconsistent with *IPSCO III*, such intra-circuit inconsistencies are best resolved by the court of appeals concerned and generally do not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Petitioners identify no decision of this Court or any other court of appeals with which the decision below conflicts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

UNITED STATES COURT
OF INTERNATIONAL TRADE

No. 95-08-01064, SLIP OP. 97-32

THE THAI PINEAPPLE PUBLIC CO., LTD., ET AL., PLAINTIFFS

AND

DOLE FOOD CO., INC., ET AL., PLAINTIFF-INTERVENORS

v.

THE UNITED STATES, DEFENDANT

AND

MAUI PINEAPPLE CO., LTD., DEFENDANT-INTERVENOR

[Filed: March 18, 1997]

OPINION

RESTANI, Judge:

This matter is before the court following remand of an antidumping duty determination.

While the parties may dispute some of the court's conclusions in Slip Op. 96-182 issued herein, there

seems to be no dispute that the Department of Commerce complied with the court's directions.

The one issue which arises solely from the remand is Commerce's decision to correct its own ministerial error. Apparently it programmed its computer with an improper currency conversion factor when the gross unit prices were already reported in U.S. dollars.

On several occasions this court has upheld decisions of Commerce not to correct errors which could have been discovered by the parties in a timely manner. This is particularly appropriate when belated error correction will have a ripple effect leading to further administrative proceedings or fact finding. The court does not ordinarily consider it an abuse of discretion if Commerce decides to correct isolated mistakes of its own. See *Cemex* v. *United States*, Slip Op. 96-170, at 2 (Oct. 24, 1996) ("programming errors are particularly susceptible to correction without administrative disruption"). As this matter was uncovered during a remand proceeding subject to narrowly drawn directions from the court, however, the better practice would have been for Commerce to have requested permission to correct the error. As Commerce's action was not clearly ultra vires, and resulted in proper error correction the court sees no purpose to ordering another remand to do what has been done.

The remand results will be sustained.

JUDGMENT

This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision.

IT IS HEREBY ORDERED: that the determination on remand of the Department of Commerce is sustained and judgment is hereby entered accordingly.